IN THE SUPREME COURT OF MISSOURI

SC92675

TARA WARD, et al., PLAINTIFFS/APPELLANTS,

v.

WEST COUNTY MOTOR COMPANY, d/b/a
WEST COUNTY BMW, DEFENDANT/RESPONDENT

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL CIRCUIT COURT,
ST. LOUIS COUNTY, MISSOURI
THE HONORABLE RICHARD C. BRESNAHAN, JUDGE

SUBSTITUTE REPLY BRIEF OF APPELLANTS

Mitchell B. Stoddard, MBE # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 tel
(314) 692-2002 fax
E-Mail: mbs@clalaw.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED ii

REPLY ARGUMENT 1

I. West County Failed to Address Plaintiffs' Key Argument: "Contract" and "Agreement" Refer to Separate Transactions, Thereby Allowing Appellants to Rescind their *Agreement* and Receive a Refund of all Monies Paid in Contemplation of a *Contract*. 1

II. West County has Failed to Articulate any Cogent Reason why Appellants' Claims of Conversion, Lack of Good Faith and Unlawful Liquidated Damages are "Premised" on Chapter 365 3

III. Plaintiffs' Substitute Brief Includes the Same Substantive Arguments as Those Contained in Their Court of Appeals Brief Regarding Their Claims for Conversion and Lack of Good Faith 7

IV. West County has Misconstrued Appellants' Argument about Unlawful Liquidated Damages: the Question is *NOT* Whether Appellants were Unfairly "Induced" to Pay a Deposit, But Rather Whether West County Unfairly "Kept" Their Deposits Based on the Liquidated Damages Clause 9

V. Because this Court is Being Asked to Consider a Final Judgment, Denominated as Such, by the Trial Court Below, and Because There Are no Other Claims or Parties Remaining Before the Trial Court, the Court has Jurisdiction to Hear This Appeal ... 11

CONCLUSION 12

CERTIFICATION 14

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

Cases

Coons v. Berry, 304 S.W.3d 215 (Mo.App. W.D. 2009) 2, 11

Electrical and Magneto Service Co. Inc. v. AMBAC Intern. Corp., 941 F.2d 660 (8th Cir. 1991) 13

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. 1992) 13

Kelly v. Marvin's Midtown Chiropractic, LLC, 2011 WL 5137311 (Mo.App. W.D. 2011) 3

Lane v. Lensmeyer, 158 S.W.3d 218 (Mo. 2005) 8

McKnight v.Midwest Eye Institute of Kansas City, Inc., 799 S.W.2d 909 (Mo.App. W.D. 1990) 5

Mercy Hospitals East Communities v. Missouri Health Facilities Review Committee, 362 S.W.3d 415 (Mo. 2012) 3

Page v. Associated Couriers, Inc., 868 S.W.2d 138 (Mo.App. E.D. 1993) 12

State ex rel. Nixon v. Continental Ventures Inc., 84 S.W.3d 114 (Mo.App. W.D. 2002). 13

Stewart v. Liberty Mutual Fire Insurance Company, 349 S.W.3d 381 (Mo.App. W.D. 2011) 11

Statutes

§ 365.070.4 RSMo 3, 4, 5, 6, 7, 13

§ 407.020 RSMo 10

Chapter 365 ..... 4, 5, 6, 7

Rules

Rule 55.10 3

Rule 81.12 12

Rule 83.08(b) 8

REPLY ARGUMENT

I. WEST COUNTY FAILED TO ADDRESS PLAINTIFFS' KEY ARGUMENT: "CONTRACT" AND "AGREEMENT" REFER TO SEPARATE TRANSACTIONS, THEREBY ALLOWING APPELLANTS TO RESCIND THEIR *AGREEMENT* AND RECEIVE A REFUND OF ALL MONIES PAID IN CONTEMPLATION OF A *CONTRACT*.

West County is ignoring Plaintiffs' central argument that "contract" and "agreement" refer to separate transactions. Even though it ruled against Plaintiffs, the court of appeals nevertheless acknowledged in its affirming opinion that "contract" and "agreement" mean different things. (Ct. of Apps. Opin. at 4).

In an attempt to obfuscate the issue, West County argues extensively that "contract" refers to a "retail installment contract," which has never been disputed by Plaintiffs. What *is* disputed is the meaning of "agreement." The statute gives motor vehicle buyers the right to rescind their "agreement." The legislature introduced a new word into the statutory language, which signals its intention to distinguish "agreement" from [retail installment] "contract." Had the legislature intended for "agreement" to mean [retail installment] "contract," it would have used the same word.

Here, "agreement" refers to the vehicle buyers order, which was executed by each Plaintiff. Plaintiffs thus had a right to rescind their *vehicle buyers order* and receive a refund of all payments made . . . on account of or <u>in contemplation of</u> a retail installment *contract*. The issue then is whether Plaintiffs "contemplated" signing a retail installment contract, not whether they actually signed one. As stated previously, Plaintiffs Ward,

Toole, Zargan and LaBarge all intended to finance their purchase, which would have meant signing a retail installment contract once they were approved for financing. West County does not dispute this fact; but even if it did, because this is only a motion to dismiss, any disputed fact would have to be resolved in favor of Plaintiffs. *Coons v. Berry*, 304 S.W.3d 215, 217 (Mo.App. W.D. 2009).

The Statute's Title is Consistent With Plaintiffs' Argument

West County places far too much emphasis on the statute's title: "The Missouri Motor Vehicle Time Sales Law." Based solely on this title, West County asserts that no provision of the statute will apply unless a retail installment contract has been fully executed by the parties. This is simply not true, however, as the statute explicitly applies to payments that were made "in contemplation of" a retail installment contract. The subject matter of the statute is not side-stepped simply because a retail installment contract has not been entered. Rather, the statute still applies to retail installment contracts which are "contemplated," even though not "completed." West County's argument would thus only be valid where, as in the case of Plaintiffs Kamal and Mona Yassin, the buyer never signed or contemplated signing a retail installment contract.

Plaintiffs concede that if "contract" and "agreement" *do* mean the same thing, their argument must fail. However, it is worth noting (again) that such an interpretation will render the statute meaningless. A retail installment contract is usually the final document a consumer signs in a car sales transaction. Once the retail installment contract has been signed, nothing can stop the car dealer from assigning it to a finance company, even if the

consumer objects. Thus, requiring consumers to sign a retail installment contract as a condition of rescinding a sale will either mean (1) consumers will go forward with the sale against their will, or (2) consumers will simply walk away from their deposits. It is therefore folly to believe, as West County prescribes, that consumers need only sign a retail installment contract in order to receive a refund of their deposits.

A statute should never be construed in such a way that will render it meaningless. *Mercy Hospitals East Communities v. Missouri Health Facilities Review Committee*, 362 S.W.3d 415, 420 (Mo. 2012). Rather, a statute should be liberally construed to best effect its intended purpose. *Kelly v. Marvin's Midtown Chiropractic*, LLC, 2011 WL 5137311, 5 (Mo.App. W.D. 2011). Here, the obvious purpose of § 365.070.4 is to insure that motor vehicle buyers, who have not received (1) an installment contract signed by the seller, or (2) delivery of a motor vehicle, can rescind their agreement and recover their deposit before either of these events has occurred. West County's interpretation of "agreement" will not accomplish that purpose, though Plaintiffs' interpretation will.

II. WEST COUNTY HAS FAILED TO ARTICULATE ANY COGENT REASON WHY APPELLANTS' CLAIMS OF CONVERSION, LACK OF GOOD FAITH AND UNLAWFUL LIQUIDATED DAMAGES ARE "PREMISED" ON CHAPTER 365

Rule 55.10 permits Plaintiffs to set forth as many claims as they wish "in one count . . . or in separate counts." Here, Plaintiffs alleged four separate MPA violations in a single count, each of which is a stand-alone claim. West County does not appear to take any issue with Plaintiffs' decision to plead this way.

West County's assertion that Plaintiffs' conversion, lack of good faith and unlawful liquidated damages claims are premised on Ch. 365 states a bald legal conclusion which is unsupported by any authority. West County's argument rests entirely on its belief that all four MPA claims seek to rescind the contract.[1] This assumption is untrue, however. Plaintiffs' conversion claim is not an action for rescission, but rather an action for *damages*. Similarly, Plaintiffs' lack of good faith and unlawful liquidated damages claims are not seeking to rescind the contract, but only to recover deposits that were unlawfully kept by West County. The only true "rescission" claim is § 365.070.4, where the statute explicitly grants Plaintiffs the right to rescind.

Notwithstanding the above, even if all four MPA claims *did* seek to rescind the contract, this, in itself, does not support the conclusion that the first three claims were premised on the fourth. In fact, West County's decision to rely on § 365.070.4 as the pivotal claim on which the others were "premised" is totally arbitrary. West County could just as easily have argued (for example) that the lack of good faith, unlawful liquidated damages and § 365.070.4 claims were "premised" on the conversion claim.

[1] West County states: "Plaintiffs' allegations that Defendant converted their deposits, failed to act in good faith, and included of [sic] an unlawful liquidated damages clause in the contract, are all premised upon the unfounded assumption that Plaintiffs had a right to rescind their transactions with Defendant under R.S.Mo. § 365.070." (Subst. Br. of Resp. at 17).

Moreover, two of the Plaintiffs, Zargan and LaBarge, are claiming that West County breached their contracts by failing to deliver their vehicles when promised. If these allegation are proven true, it means West County is asserting contractual rights which no longer existed as a direct result of West County's own conduct. See e.g., *McKnight v.Midwest Eye Institute of Kansas City, Inc.*, 799 S.W.2d 909, 915 (Mo.App. W.D. 1990) ("a party who is the first to violate the contract by failure to give material performance may not claim its benefit"). Requiring one party to perform after the other has breached "slights the duty of good faith and fair dealing our law imposes upon the parties of contract." *Id*. at 914. Zargan and LaBarge therefore have a particularly strong argument that their lack of good faith claims state claims under the MPA.

The Adoption of West County's Argument Would Mean That Ch. 365 Would Preempt All Other Claims Seeking Recovery of a Motor Vehicle Deposit

The inevitable outcome of this Court adopting West County's argument would result in § 365.070.4 preempting all other statutory and common law claims seeking recovery of a motor vehicle deposit. If claims such as conversion, lack of good faith and unlawful liquidated damages are "premised" on Ch. 365, it necessarily means that these claims, and others like them, could never ever be brought outside of a Ch. 365 claim.

Nowhere does West County argue that ONLY conversion, lack of good faith and unlawful liquidated damages claims are "premised" on Ch. 365. Rather, West County's argument leads to the inevitable conclusion that *any* claim seeking recovery of a motor vehicle deposit is premised on Ch. 365. Ultimately, this means that every imaginable

common law and statutory claim seeking to recover a motor vehicle deposit would be "premised" on Ch. 365 (including fraudulent misrepresentation). In other words, Ch. 365 would preempt every other cause of action where a motor vehicle deposit is concerned.

West County's argument is thus not limited to plaintiffs like Ward, Toole, Zargan and LaBarge, who allegedly failed to state a claim under § 365.070.4. Rather, even plaintiffs like Kamal and Mona Yassin (who had no claim under § 365.070.4 at all because they never "contemplated" entering a retail installment contract) would also be precluded from recovering their deposits. This could not possibly be what the legislature intended when it enacted Ch. 365.

Even Assuming Plaintiffs' Claims are Not "Definite and Certain," This is an Insufficient Basis for the Dismissal of Those Claims

At one point in its substitute brief, West County argues in sequential paragraphs that (1) Plaintiffs' claims are "premised" on Ch. 365, and (2) Plaintiffs are "the master of [their] petition" and have the burden of making their pleadings "sufficiently definite and certain." (Subst. Br. of Resp. at 17). Reading these two paragraphs together, it appears as if West County is arguing that Plaintiffs' claims are premised on Ch. 365 *because* their pleadings are indefinite and uncertain.

West County fails to explain how "indefinite and uncertain" pleadings can result in Plaintiffs' claims being "premised" on Ch. 365. If West County means that Plaintiffs' have inartfully drafted their petition so it only *appears* that their conversion, lack of good

faith and unlawful liquidated damages claims are premised on Ch. 365, this would not be sufficient grounds to dismiss their MPA claims.

A finding by this Court that Plaintiffs' conversion, lack of good faith and unlawful liquidated damages claims were "premised" on Ch. 365 would mean that no future consumer could ever recover a deposit paid to a car dealer without asserting a valid claim under § 365.070.4. Thus, *no* consumer who pays cash for a vehicle (and thereby falls outside Ch. 365's protections) will ever be able to recover a deposit under any theory of law. This argument must be soundly rejected by this Court, and Plaintiffs' conversion, lack of good faith and unlawful liquidated damages claims should be reinstated.

III. PLAINTIFFS' SUBSTITUTE BRIEF INCLUDES THE SAME SUBSTANTIVE ARGUMENTS AS THOSE CONTAINED IN THEIR COURT OF APPEALS BRIEF REGARDING THEIR CLAIMS FOR CONVERSION AND LACK OF GOOD FAITH

West County's argument that Plaintiffs abandoned their conversion and lack of good-faith claims is meritless. The title of Point I of Plaintiffs' substitute brief states in pertinent part:

> The Trial Court Erred When It Dismissed Count I of Plaintiffs' Second Amended Petition Because (1) ***Claims of Conversion, Lack of Good Faith and Unlawful Liquidated Damages*** are "Unfair Practices" Which State Claims Under the MPA (emphasis added).

Thus, Plaintiffs' conversion, lack of good faith and unlawful liquidated damages claims were *central* to Point I of their substitute brief, and were anything but *abandoned*.

In order to prevail on this issue, West County must convince the Court that Plaintiffs are either attempting to alter the basis of a claim that was raised in the court of appeals, or that Plaintiffs failed to include material from the court of appeals brief, thereby abandoning said material. (See Rule 83.08(b)). Here, West County is only arguing that Plaintiffs "abandoned" their court of appeals claims, not that they are attempting to alter the basis of those claims.

The lone case cited by West County on this issue is *Lane v. Lensmeyer*, 158 S.W.3d 218 (Mo. 2005). *Lane* is not on point however, because the respondent was claiming the appellants had "altered the basis" of their claim, not that they had "abandoned" their claim, as here. *Id.* at 230. In *Lane*, the appellants introduced an entirely new calculation formula into their substitute brief, which this Court deemed significant enough to have altered the basis of the appeal. *Lane*, 158 S.W.3d at 229. However, the Court made no finding that the argument had been "abandoned" simply because the formula was different.

By contrast, Plaintiffs here have made the exact same claims in their substitute brief as was made in their court of appeals brief. Both the title to Point I and the substance of Plaintiffs' argument make it abundantly clear that Plaintiffs are asking the Court to find that conversion and lack of good faith state claims under the MPA.

Similarly, although not argued, Plaintiffs have not altered the basis of their court of appeals claims either. Arguably, Plaintiffs have streamlined their argument somewhat,

but the claims themselves are identical. There is therefore no merit whatsoever to West County's argument.

IV. WEST COUNTY HAS MISCONSTRUED APPELLANTS' ARGUMENT ABOUT UNLAWFUL LIQUIDATED DAMAGES: THE QUESTION IS *NOT* WHETHER APPELLANTS WERE UNFAIRLY "INDUCED" TO PAY A DEPOSIT, BUT RATHER WHETHER WEST COUNTY UNFAIRLY "KEPT" THEIR DEPOSITS BASED ON THE LIQUIDATED DAMAGES CLAUSE

West County seems to argue that, even assuming the liquidated damages clause IS unlawful, Plaintiffs have nevertheless failed to state a claim because the liquidated damages clause has no causal connection to their damages. In arguing its point, West County raises a "red herring" by arguing the *real* cause of Plaintiffs' damages was West County's [alleged] misrepresentations, not the unlawful liquidated damages language. (Subst. Br. of Resp. at 24). However, West County does not seem to realize it has only identified a factual issue which must ultimately be resolved by the jury.

There are three issues with respect to West County's liquidated damages clause that will be resolved, one way or the other, by the end of this litigation: (1) whether the liquidated damages clause is a penalty and, therefore, unlawful; (2) whether the use of an unlawful liquidated damages clause states a claim under the MPA; and (3) whether West County violated the MPA by using an unlawful liquidated damages clause in its vehicle buyers order. Plaintiffs have only raised the first two issues before this Court. However,

whether or not the unlawful liquidated damages clause caused Plaintiffs to suffer an ascertainable loss of money is a question of fact that falls within the third issue.

There can be no doubt that Plaintiffs have alleged facts sufficient to state a claim under the MPA. Namely, Plaintiffs have alleged (1) they purchased an automobile from West County [merchandise], (2) for personal, family or household use (L.F. at 55), and (3) suffered an ascertainable loss of money or property [lost deposits] (L.F. at 57), (4) as a result of an act declared unlawful by § 407.020 RSMo (L.F. at 55). Here, Plaintiffs alleged, *inter alia*, that using an unlawful liquidated damages clause was an "unfair practice," which is one of the acts declared unlawful by § 407.020. (L.F. at 56). It is hard to imagine how Plaintiffs could have been any more precise in stating an MPA claim.

West County does not challenge the sufficiency of these pleadings. For instance, West County does not claim there are insufficient facts to show an ascertainable loss of money or property, or that the automobiles were not purchased for personal, family or household use. Rather, West County makes the broad policy argument that unlawful liquidated damages can never cause an ascertainable loss of money or property, which is preposterous.

To the extent West County is arguing that the mere *existence* of an unlawful liquidated damages clause fails to state a claim under the MPA, Plaintiffs essentially agree. For example, West County has undoubtedly sold thousands of automobiles to consumers who signed the same contracts as Plaintiffs, but who (assuming their deposits were either refunded or applied toward the purchase of an automobile) do not have claims under the MPA. West County is simply missing the point, however, when it argues that Plaintiffs

are claiming the unlawful liquidated damages clause in some way "induced" them to sign the buyers order. (Subst. Br. of Resp. at 24). The proper question is whether the unlawful liquidated damages clause resulted in an ascertainable loss of money or property to Plaintiffs. Here, it is undisputed that West County *kept* the deposits, thereby resulting in a loss of those monies by Plaintiffs. Plaintiffs do not have to prove the truth of this assertion at this stage, since all factual issues must be resolved in their favor. *Coons*, supra, 304 S.W.3d at 217. Whether or not the liquidated damages clause caused, or merely contributed to Plaintiffs' loss, however, is a question of fact to be left for a later day.

V. BECAUSE THIS COURT IS BEING ASKED TO CONSIDER A FINAL JUDGMENT, DENOMINATED AS SUCH, BY THE TRIAL COURT BELOW, AND BECAUSE THERE ARE NO OTHER CLAIMS OR PARTIES REMAINING BEFORE THE TRIAL COURT, THIS COURT HAS JURISDICTION TO HEAR THE APPEAL

The rule concerning a "judicial unit" only becomes relevant when a trial court disposes of some, but not all issues in a case, and a party wants to appeal those issues while the remaining claims are still pending. That is not the case here. In this case, the trial court dismissed count I of Plaintiffs' second amended petition with prejudice, and Plaintiffs then voluntarily dismissed count II without prejudice. Thus, there were NO remaining claims before the trial court when Plaintiffs filed the instant appeal. The judicial unit rule is therefore inapplicable to this appeal. See, *Stewart v. Liberty Mutual Fire Insurance Company*, 349 S.W.3d 381, 384-385 (Mo.App. W.D. 2011).

West County seems to be arguing that no appeal is possible as long as there are claims which *could* be brought in the trial court. If so, it would mean that a plaintiff would have to allege every conceivable cause of action, and wait until each such action was disposed of, before securing the right to appeal. This, of course, would establish an unworkable standard. Many viable causes of action are often left out of lawsuits for any number of reasons. West County's argument would force plaintiffs to bring claims they did not wish to bring, which is ludicrous.

Next, West County argues that because Plaintiffs re-filed their voluntarily dismissed claim, this Court was somehow divested of jurisdiction. This argument again reveals West County's fundamental misunderstanding of the nature of a "judicial unit." There is nothing in the record on appeal that would indicate to this Court that any unresolved claims remain pending in the trial court below. In order to make such a determination, the Court would have to look outside the record on appeal to consider the posture of an entirely different case. Since the subject matter of an appeal is necessarily tethered to the record on appeal, there is nothing before this Court to consider. See, Rule 81.12; *Page v. Associated Couriers, Inc.*, 868 S.W.2d 138, 140 (Mo.App. E.D. 1993).

CONCLUSION

Given the broad, remedial purpose of the MPA, it should not be difficult for consumers to state a claim against car dealers who take their money and provide no merchandise or service in return. West County took money in the form of deposits from Tara Ward, Kamal and Mona Yassin, Matthew Toole, Curt Zargan and Lawrence

LaBarge, but provided nothing in exchange for their money. West County's entire defense is wrapped in the lone assertion that Plaintiffs never signed a retail installment contract. According to West County, only consumers who sign a retail installment contract are entitled to bring a claim under § 365.070.4, and only claims brought under § 365.070.4 entitle consumers to receive a refund of their deposits.

The MPA was enacted to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992). The MPA's fundamental purpose is the protection of consumers. *State ex rel. Nixon v. Continental Ventures Inc*., 84 S.W.3d 114, 117 (Mo.App. W.D. 2002). Significantly, at least one court has referred to the MPA as "paternalistic legislation." See, *Electrical and Magneto Service Co. Inc. v. AMBAC Intern. Corp.*, 941 F.2d 660, 663 (8th Cir. 1991). Plaintiffs are unaware of *any* other Missouri statute that has ever been described this way.

Plaintiffs' claims are precisely what the legislature had in mind when it enacted the MPA. For the above reasons, the trial court's judgment should be reversed.

Respectfully Submitted,

/s/ Mitchell B. Stoddard
Mitchell B. Stoddard, # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 tel
(314) 692-2002 fax
E-Mail: mbs@clalaw.com

Attorneys for Appellants

CERTIFICATION

The undersigned certifies that on this 22nd day of October 2012, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following: Bryan M. Kaemmerer, Attorney for Defendant, 400 South Woods Mill Road, Suite 250, Chesterfield, Missouri 63017.

The undersigned further certifies this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 3,967 words.

/s/ Mitchell B. Stoddard
Mitchell B. Stoddard, # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 tel
(314) 692-2002 fax
E-Mail: mbs@clalaw.com

Attorneys for Appellants